ANG BENG TEIK

v.

PAN GLOBAL TEXTILE BHD., PENANG

COURT OF APPEAL, KUALA LUMPUR
TUAN SRI RAMACHANDRAN RAMASAMY GOPAL IYER JCA
DATO' SITI NORMA YAAKOB JCA
DATO' ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: P-02-110-94]
5 AUGUST 1996

LABOUR LAW: *Employment - Suspension - Domestic inquiry - Demotion - Protest against demotion - Failure to report for work in demoted capacity - Termination of service - Representations - Industrial Court - Monetary compensation in lieu of re-instatement - Award quashed by High Court - Appeal.*

LABOUR LAW: *Employment - Industrial Relations Act 1967, s. 20 - Protection of workmen from dismissal - Just cause or excuse - Intention of Parliament - Whether a proprietary right - Whether a fundamental liberty guaranteed by Federal Constitution.*

LABOUR LAW: *Employment - Industrial Relations Act 1967, s. 20 - Applicability - Whether workman must have considered himself to have been dismissed without just cause or excuse - Whether a condition precedent to making representations.*

LABOUR LAW: *Employment - Industrial Relations Act 1967, s. 20(1A) - Time - Representations - 60 days - Whether exceeded - When does time start to run - Jurisdiction of Industrial Court - Whether precluded.*

LABOUR LAW: *Employment - Constructive dismissal - Nature and scope - Conduct of employer towards employee - Short of formal dismissal or termination - Whether amounting to dismissal without just cause or excuse - Whether facts must always disclose that workman considered himself dismissed by act of employer.*

LABOUR LAW: *Employment - Industrial Relations Act 1967, s. 20 - Common law, applicability of - Principles on discharge of contract of service by repudiation and acceptance - Principles on breach of contract - Whether relevant.*

LABOUR LAW: *Industrial Court - Decision - Award - Whether findings and conclusion within scope of inquiry - Whether there was error of law.*

ADMINISTRATIVE LAW: *Exercise of judicial functions - Jurisdiction of High Court - Whether appellate jurisdiction or supervisory jurisdiction - Whether High Court converted into an appellate tribunal - Whether to set right errors of law which do not occasion injustice in a broad and general sense - Or whether to exercise jurisdiction only when substantial injustice has ensued or is likely to ensue.*

WORDS & PHRASES: *'Constructive dismissal'.*

The appellant was the respondent's general manager at the latter's Penang office. On 16 January 1989, the respondent suspended the appellant. A domestic inquiry then ensued. Of the 11 charges of misconduct framed against the appellant, the inquiry found that eight were proven. The appellant was then demoted. The appellant protested against his demotion and did not report for work. An exchange of correspondence between the parties then followed. On 6 June 1989, the respondent terminated the appellant's services on the ground that he was no longer interested in working.

On 20 July 1989, the appellant made representations to the Director-General for Industrial Relations ('the D-G') under s. 20 of the Industrial Relations Act 1967 ('the Act') alleging that he was dismissed without just cause or excuse. The conciliatory efforts made by the D-G were to no avail and he referred the representations to the Minister who then referred the same to the Industrial Court.

By an award dated 8 March 1993, the Industrial Court found for the appellant and awarded him the sum of RM133,419 as compensation *in lieu* of re-instatement. Dissatisfied, the respondent moved the High Court for *certiorari*. The learned Judge allowed the motion and issued an order for *certiorari* quashing the award. The appellant appealed.

The three issues that fell for determination were: (i) whether the appellant's representations were made beyond the 60-day limit prescribed by s. 20(1) of the Act, thus depriving the Industrial Court of the jurisdiction to hear the reference; (ii) whether the Industrial Court had exceeded its jurisdiction in concluding that the appellant was dismissed from employment; and (iii) whether the Industrial Court was wrong in concluding that the dismissal was without just cause or excuse.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] Section 20(1) of the Act protects a workman from dismissal save for just cause or excuse. Parliament has, accordingly, placed the right of a workman to continue in employment on the same footing as a proprietary right which may not be forfeited save for just cause or excuse. Employment, ie, the right to one's livelihood, is also a fundamental liberty guaranteed by the Federal Constitution.

[2] Section 20(1) of the Act uses subjective language. Thus, for s. 20 of the Act to apply, the workman must have considered himself to have been dismissed without just cause or excuse. A workman has no right to make such representations unless and until this condition precedent has been satisfied.

[3] Time under s. 20(1A) of the Act begins to run from the moment the workman considers himself to have been dismissed without just cause or excuse; not a moment sooner. An objective assessment of the facts of a particular case will disclose the point of time at which the workman has, by words or by conduct, considered himself as dismissed. One may then be able to say when the 60-day period prescribed by s. 20(1A) of the Act began.

[4] There is no magic in the expression 'constructive dismissal'. It is only a convenient label to describe the kind of conduct of an employer towards an employee which, though short of a formal dismissal or termination, the latter may treat as amounting to a dismissal without just cause or excuse. The categories of such conduct are not closed. Whether the conduct complained of is, in truth, a dismissal cloaked as something else, is a question of fact. But the facts must disclose that the particular workman has considered himself as dismissed by the particular act of the employer.

[5] On the facts of the instant case, it was beyond question that the 60-day time frame did not commence from the date of the demotion – which was never challenged – but from the date of the impugned termination. Therefore, the representations were made within the prescribed time limit. Consequently, the Industrial Court had the jurisdiction to entertain the reference.

[6] If, at that point in time when the appellant was notified of the respondent's decision to demote him, the appellant had, by words or conduct, demonstrated that he considered himself to have been dismissed by that act of demotion, then time would have commenced to run from that date. If, however, as transpired in the instant case, the appellant did not consider himself as dismissed, but had allowed the respondent to reconsider its decision, then it could not be said that the appellant had considered himself to have been dismissed without just cause or excuse. It was a question of fact to be determined by the Industrial Court. And that was what the Industrial Court did when it said that this was not a case of constructive dismissal.

[7] While the ordinary principles of common law relating to the discharge of a contract of service by repudiation and acceptance may continue to apply in the United Kingdom, they are wholly irrelevant to a case under s. 20(1) of the Act. Industrial adjudication is not concerned with the

technicalities that form part and parcel of the common law doctrine of repudiation. The Industrial Court, when it decides whether a workman has been dismissed without just cause or excuse, is wholly unconcerned with whether there has been a repudiation by the workman of his contract of employment, but, rather, with the much broader question whether that which happened to the workman is just and equitable. If, at the end of the day, it finds that the workman deserves what he got, then, *cadit quaestio*. But, if it finds the act or omission on the part of the employer that deprived the workman of his proprietary right to earn a living to have been without just cause or excuse, then it will, and must, interfere.

[8] The very purpose for which Parliament passed the Act and the several amendments thereto was to mitigate the rigours of the common law and the doctrines of equity in their application to the relationship between an employer and his workman. It is, therefore, too late in the day to try and interpret the Act to keep it in line with the common law doctrines that apply to a breach of contract.

[9] The learned Judge appeared to have assumed the task of making a finding that, based on the facts of the case, the appellant's dismissal was justified. What the learned Judge did smacks of the exercise of appellate power when the jurisdiction he was exercising was purely supervisory. The question whether the appellant's dismissal was justified or had amounted to an act of victimisation was for the Industrial Court to determine.

[10] The Industrial Court's finding, that the appellant had been victimised, was a conclusion that was well within the scope of its inquiry. It did not commit any error of law when performing the task entrusted to it.

[11] In the exercise of its supervisory jurisdiction, the High Court is entitled to examine, not only the decision-making process, but the merits of the decision itself. Nonetheless, the High Court is not converted into an appellate tribunal for that purpose. The High Court will not allow itself to be turned into a Court of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense. It will not exercise its jurisdiction unless substantial injustice has ensued or is likely to ensue.

[Appeal allowed; order of High Court set aside; and award by Industrial Court re-instated]

[Appeal from High Court Malaya, Pulau Pinang; Originating Motion No: 25-15 of 1993]

***[Bahasa Malaysia** Translation of Headnotes]*

***UNDANG-UNDANG BURUH:** Penggajian - Penggantungan - Siasatan domestik - Penurunan pangkat - Bantahan terhadap penurunan pangkat - Kegagalan untuk melaporkan diri untuk bekerja dalam kedudukan diturunkan pangkat - Penamatan perkhidmatan - Pengemukaan - Mahkamah Perusahaan - Pampasan dalam bentuk wang bagi menggantikan pengambilan semula - Award dibatalkan oleh Mahkamah Tinggi - Rayuan.*

***UNDANG-UNDANG BURUH:** Penggajian - Seksyen 20 Akta Perhubungan Perindustrian 1967 - Perlindungan pekerja daripada pemecatan - Alasan yang adil atau alasan semata - Niat Parlimen - Samada suatu hak keempunyaan - Samada suatu kebebasan asasi yang dijamin oleh Perlembagaan Persekutuan.*

***UNDANG-UNDANG BURUH:** Penggajian - Seksyen 20 Akta Perhubungan Perindustrian 1967 - Keterterapan - Samada pekerja telah menganggapkan dirinya sebagai telah dipecat tanpa alasan atau sebab yang adil - Samada satu syarat duluan kepada membuat pengemukaan.*

***UNDANG-UNDANG BURUH:** Penggajian - Seksyen 20(1A) Akta Perhubungan Perindustrian 1967 - Masa - Pengemukaan - 60 hari - Samada telah melebihi - Bilakah masa mula luput - Bidangkuasa Mahkamah Perusahaan, samada terhalang.*

***UNDANG-UNDANG BURUH:** Penggajian - Pemecatan konstruktif - Sifat & bidang (scope) - Sikap majikan terhadap pekerja - Ketiadaan pemecatan atau pemberhentian rasmi - Samada fakta-fakta haruslah sentiasa mendedahkan bahawa pekerja menganggapkan dirinya dipecatkan dengan perbuatan majikan itu.*

***UNDANG-UNDANG BURUH:** Penggajian - Seksyen 20 Akta Perhubungan Perindustrian 1967 - Keterterapan common law - Prinsip atas pelepasan kontrak perkhidmatan melalui penolakan atau penerimaan - Prinsip atas kemungkiran kontrak - Samada relevan.*

***UNDANG-UNDANG BURUH:** Mahkamah Perusahaan - Keputusan - Award - Samada keputusan dan kesimpulan dalam bidang siasatan - Samada berlaku kesilapan undang-undang.*

***UNDANG-UNDANG PENTADBIRAN:** Perlaksanaan fungsi kehakiman - Bidang kuasa Mahkamah Tinggi - Samada bidangkuasa rayuan atau bidangkuasa penyeliaan - Samada Mahkamah Tinggi diubah menjadi tribunal rayuan - Samada harus membetulkan kesilapan undang-undang yang mana tidak akan menyebabkan ketidak-adilan dalam ertikata yang luas dan secara umum - Atau samada untuk melaksanakan bidangkuasa hanya bila ketidak-adilan substansial telah berlaku atau mungkin akan berlaku.*

***PERKATAAN & UNGKAPAN:** "Pemecatan konstruktif".*

Perayu adalah pengurus besar responden di pejabat Pulau Pinang responden. Pada 16 Jun 1989, responden telah menggantung kerja perayu tersebut. Satu siasatan domestik telah bermula. Daripada 11 tuduhan salah-laku ke atas perayu tersebut, siasatan tersebut mendapati lapan terbukti. Perayu tersebut telah kemudiannya diturunkan pangkat. Perayu membantah atas penurunan pangkatnya dan tidak melaporkan diri untuk bekerja. Satu perutusan surat antara pihak-pihak tersebut kemudiannya berlaku. Pada 6 Jun 1989, responden telah menamatkan perkhidmatan perayu atas alasan beliau tidak lagi berminat untuk bekerja.

Pada 20 Julai 1989, perayu tersebut telah membuat pengemukaan kepada Ketua Pengarah Perhubungan Perindustrian ('K.P. tersebut') di bawah s. 20 Akta Perhubungan Perindustrian 1967 ('Akta tersebut') mengatakan bahawa beliau telah dipecat tanpa alasan atau sebab yang adil. Usaha-usaha pendamaian yang dibuat oleh K.P. tersebut tidak berhasil dan beliau telah merujuk pengemukaan-pengemukaan tersebut kepada Menteri yang kemudiannya merujuk perkara tersebut kepada Mahkamah Perusahaan.

Melalui satu award yang bertarikh 8 Mac 1989, Mahkamah Perusahaan telah memutuskan memihak kepada perayu tersebut dan telah mengawardkannya jumlah sebanyak RM133,419 sebagai pampasan bagi ganti pengambilan-semula. Berasa tidak puashati, responden tersebut telah mengusulkan Mahkamah Tinggi untuk mendapatkan *certiorari*. Hakim yang bijaksana tersebut telah membenarkan usul itu dan mengeluarkan satu perintah *certiorari* yang membatalkan award tersebut. Perayu telah merayu.

Ketiga-tiga isu yang harus ditentukan adalah: (i) samada pengemukaan-pengemukaan perayu tersebut dibuat sebelum had masa 60 hari yang ditetapkan oleh s. 20(1) Akta tersebut, yang dengan itu melucutkan bidangkuasa Mahkamah Perusahaan untuk mendengar rujukan tersebut; (ii) samada Mahkamah Perusahaan telah melampaui bidangkuasanya dalam memutuskan bahawa perayu telah dipecat daripada pekerjaan; dan (iii) samada Mahkamah Perindustrian salah dalam memutuskan bahawa pemecatan tersebut adalah atas alasan atau sebab yang tidak adil.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Seksyen 20(1) Akta tersebut melindungi seseorang pekerja daripada pemecatan melainkan atas alasan atau sebab yang adil. Parlimen telah, sehubungan itu, meletakkan hak seseorang pekerja untuk terus bekerja atas dasar yang sama dengan hak keempunyaan yang tidak boleh dilucutkan melainkan atas alasan atau sebab yang adil. Penggajian, iaitu hak kepada mata pencarian bagi seseorang, adalah juga suatu kebebasan asasi yang dijamin oleh Perlembagaan Persekutuan.

[2] Seksyen 20(1) Akta tersebut menggunakan bahasa subjektif. Dengan itu, bagi memakai s. 20 Akta tersebut, pekerja tersebut mestilah mengganggapkan dirinya telah dipecat atas alasan atau sebab yang tidak adil. Seseorang pekerja tidak berhak untuk membuat pengemukaan-pengemukaan yang sedemikian kecuali dan sehingga syarat duluan ini telah dipenuhi.

[3] Masa mula beredar di bawah s. 20(1A) Akta tersebut daripada ketika pekerja itu menganggapkan dirinya telah dipecat tanpa alasan atau sebab yang adil; dan tidak sesaat pun sebelum itu. Satu taksiran objektif akan fakta-fakta sesuatu kes yang tertentu akan mendedahkan waktu dan ketika bilamana seseorang pekerja itu telah, menurut kata-kata atau menurut kelakuan, menganggapkan dirinya sebagai telah dipecat. Seseorang dengan itu boleh menyatakan bilakah tempoh 60 hari yang ditetapkan oleh s. 20 (1A) Akta tersebut bermula.

[4] Tidak terdapat apa-apa yang ajaib dalam ungkapan "pemecatan konstruktif". Ianya hanya satu label yang mudah bagi menerangkan sifat kelakuan seseorang majikan terhadap seseorang pekerja yang mana, walaupun ketiadaan suatu pemecatan atau pemberhentian yang rasmi, pekerja tersebut boleh menganggapnya sebagai membawa kepada suatu pemecatan tanpa alasan atau sebab yang adil. Kategori-kategori kelakuan yang sedemikian tidak terselindung. Samada kelakuan yang diadukan adalah, sebenarnya, satu pemecatan disebalik sesuatu yang lain, adalah suatu persoalan fakta. Tetapi fakta-fakta tersebut mesti mendedahkan bahawa pekerja yang khusus itu telah menganggap dirinya dipecat oleh perbuatan khusus majikan tersebut.

[5] Berdasarkan fakta-fakta kes semasa ini, ianya adalah di luar persoalan bahawa tempoh masa 60 hari tersebut tidak bermula daripada tarikh penurunan pangkat - yang mana tidak pernah dicabar - tetapi hanya daripada tarikh pemberhentian yang dipersoalkan itu. Dengan itu, pengemukaan-pengemukaan tersebut telah dibuat dalam tempoh yang dihadkan. Akibatnya, Mahkamah Perusahaan mempunyai bidangkuasa untuk mempertimbangkan rujukan tersebut.

[6] Jika, pada waktu itu perayu diberitahu mengenai keputusan responden untuk menurunkan pangkatnya, perayu tersebut telah, melalui perkataan-perkataan atau kelakuan, menunjukkan bahawa beliau menganggapkan dirinya sebagai telah dipecat dengan perbuatan penurunan pangkat itu, bahawa masa akan mula beredar daripada tarikh itu. Walaubagaimanapun, jika sepertimana yang telah berlaku dalam kes semasa ini, perayu tidak menganggapkan dirinya sebagai dipecat, tetapi telah membenarkan responden untuk menimbangkan semula keputusannya, maka ianya tidak boleh diperkatakan bahawa perayu telah menganggapkan dirinya sebagai telah dipecat tanpa alasan atau sebab yang adil. Ianya adalah persoalan

fakta untuk ditentukan oleh Mahkamah Perusahaan. Dan itulah yang telah dilakukan oleh Mahkamah Perusahaan bilamana ianya mengatakan bahawa ini bukannya merupakan satu kes pemecatan konstruktif.

[7] Sementara prinsip common law berhubung pelepasan sesuatu kontrak perkhidmatan melalui penolakan atau penerimaan mungkin berterusan dipakai di United Kingdom, ianya adalah sesungguhnya tak relevan kepada sesuatu kes di bawah s. 20(1) Akta tersebut. Adjudikasi perindustrian tidak mengambil perhatian akan perkara teknikal yang membentuk doktrin penolakan common law. Mahkamah Perusahaan, bilamana membuat keputusan samada seseorang pekerja itu telah dipecat tanpa alasan atau sebab yang adil, adalah sesungguhnya tidak menghiraukan samada telah berlaku penolakan oleh pekerja itu akan kontrak pekerjaannya, tetapi akan persoalan yang lebih luas iaitu samada apa yang telah berlaku kepada sipekerja itu adalah adil dan saksama. Jika, kesudahannya, ianya berkeputusan bahawa pekerja itu berhak mendapati apa yang telah diperolehinya, maka *cadit quaestio*. Tetapi, jika ianya memutuskan perbuatan atau peninggalan oleh majikan itu melucuthak pekerja tersebut akan hak keempunyaannya untuk mendapatkan sara hidup sebagai tanpa alasan atau sebab yang adil, maka ianya akan dan harus mengganggguinya.

[8] Satu-satunya tujuan Parlimen meluluskan Akta tersebut dan beberapa pindaan kepadanya adalah untuk mengurangkan keketatan common law dan doktrin-doktrin ekuiti dalam pemakaiannya kepada perhubungan antara majikan dan pekerjanya. Adalah dengan itu, agak lewat untuk cuba mentafsirkan Akta tersebut bagi melaraskannya dengan doktrin-doktrin common law yang terpakai kepada sesuatu kemungkinan kontrak.

[9] Hakim yang bijaksana tersebut kelihatan seperti telah mengambil tugas membuat satu keputusan bahawa, berdasarkan fakta-fakta kes tersebut, pemecatan perayu tersebut adalah wajar. Apa yang telah dilakukan oleh Hakim ada unsur pelaksanaan kuasa rayuan sedangkan bidangkuasa beliau adalah sesungguhnya bersifat penyeliaan. Persoalan samada pemecatan perayu adalah wajar atau telah membawa kepada satu perbuatan pemangsaan adalah untuk ditentukan oleh Mahkamah Perusahaan.

[10] Keputusan Mahkamah Perusahaan, bahawa perayu tersebut telah dijadikan mangsa, adalah satu keputusan yang ada dalam bidang siasatannya. Ianya tidak melakukan apa apa kesalahan undang-undang bilamana melaksanakan tugas yang dipertanggungjawabkan kepadanya.

[11] Dalam melaksanakan bidangkuasa penyeliaannya, Mahkamah Tinggi adalah berhak untuk memeriksa, bukan sahaja proses membuat keputusan, tetapi merit keputusan itu sendiri. Namun begitu, Mahkamah Tinggi tidak ditukarkan menjadi tribunal rayuan bagi tujuan itu. Mahkamah Tinggi tidak boleh membenarkan dirinya diubah menjadi sebuah mahkamah rayuan atau

semakan bagi membetulkan kesilapan undang-undang yang mana tidak menyebabkan ketidak-adilan dalam ertikata yang luas. Ianya tidak boleh melaksanakan bidangkuasanya kecuali ketidak-adilan yang substantial telah berlaku atau berkemungkinan akan berlaku.

[Rayuan dibenarkan; perintah Mahkamah Tinggi diketepikan; dan award oleh Mahkamah Perusahaan dihidupkan semula]

Cases referred to:

Hong Leong Equipment Sdn. Bhd. & Anor. v. Liew Fook Chuan [1996] 1 MLJ 481 ***(foll)***

Rama Chandran v. The Industrial Court of Malaysia & Anor., Federal Court Civil Appeal 02-13-94 ***(cit)***

Goon Kwee Phoy v. J. & P. Coats (M) Bhd. [1981] 2 MLJ 129 ***(foll)***

Stanley Ng Peng Hon v. AAF Pte. Ltd. [1979] 1 MLJ 57 ***(cit)***

Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. [1988] 1 MLJ 92 ***(not foll)***

Dr. A. Dutt v. Assunta Hospital [1981] 1 MLJ 304 ***(foll)***

Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers' Union [1995] 2 CLJ 748 ***(cit)***

L. Michael v. Johnson Pumps Ltd. AIR [1975] SC 661 ***(cit)***

Thomas Marshall (Exports) Ltd. v. Guinle [1979] 1 Ch. 227 ***(cit)***

Gunton v. Richmond-Upon-Thames London Borough Council [1980] 3 WLR 714 ***(refd)***

London Transport Executive v. Clarke [1981] ICR 355 ***(not foll)***

Bouzourou v. The Ottoman Bank [1930] AC 271 ***(cit)***

United Engineering Workers Union v. Devanayagam [1967] 2 All ER 367 ***(cit)***

Pendlebury v. Christian Schools North West Ltd. [1985] ICR 174 ***(cit)***

Dreamland Corporation (M) Sdn. Bhd. v. Choong Chin Sooi & Anor. [1988] 1 MLJ 111 ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor. [1995] 3 MLJ 369 ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20(1), (1A), (3), 30(5)

For the appellant - N. Shanmugam; M/s. Shan & Gooi

For the respondents - M. Nagarajah (Anthony Leong with him); M/s. Riza Leong & Partners

JUDGMENT

Gopal Sri Ram JCA:

The law is filled with cases where a miscarriage of justice has occurred because regard is had to labels and not substance. The present appeal is one such case. Its facts are as follows.

The appellant was the respondent's General Manager at the latter's Penang office. The respondent suspended him from service. The suspension took effect on 16 January 1989. During the suspension, the respondent investigated into allegations against the appellant. As a result of these investigations 11 charges

of misconduct were framed against the appellant. A domestic inquiry into these charges found eight of them to have been proved. The respondent did not dismiss the appellant in consequence of these findings. Instead, it reduced him in rank. It wrote him a letter dated 2 May 1989 informing him of the demotion which was to take effect on the following day.

The appellant took the position that he was not guilty of anything. He protested about his demotion. He wanted his old job back. He wrote to the respondent about it. There was an exchange of correspondence between them. The learned Judge has dealt with it at length in his judgment. We therefore find it unnecessary to reproduce it here. Eventually, on 6 June 1989, the respondent wrote to the appellant terminating his services on the ground that he was no longer interested in working for the respondent.

On 20 July 1989, the appellant wrote to the Director-General of Industrial Relations making representations that he had been dismissed without just cause or excuse. These representations were made under s. 20 of the Industrial Relations Act, 1967 ('the Act'). They are very important provisions in the context of this case; especially s. 20(1A) which imposes a time limit for the receipt of representations by the Director-General. We will consider the relevant provisions a little later. For the moment we will deal with what remains of the chronology.

On receipt of the appellant's representations, the Director-General attempted to resolve the dispute. But he was unable to do so. He therefore referred the representations to the Minister who then referred them to the Industrial Court. In his letter to the Industrial Court, the Minister expressly referred to the appellant's alleged dismissal on 6 June 1989.

By an award dated 8 March 1993, the Industrial Court held that the appellant had been dismissed without just cause or excuse. It refused reinstatement but instead awarded the appellant a sum of RM133,419 as compensation *in lieu* thereof.

The respondent then moved the High Court at Penang for *certiorari*. Three grounds were relied upon to support the application. They are as follows.

First, the appellant's representations were made beyond the 60 days limited by s. 20(1) of the Act. The Industrial Court therefore lacked jurisdiction to hear the reference to it by the Minister of these representations.

Second, the Industrial Court had exceeded its jurisdiction in concluding that the appellant had been dismissed from his employment in the face of clear evidence that it was the appellant who had wrongfully repudiated his contract of employment he had with the respondent.

Third, even if the termination of the appellant's employment by the respondent amounted to dismissal, there was no necessity for the respondent to conduct any further inquiry. The Industrial Court was wrong in concluding that the dismissal was without just cause or excuse because no inquiry was held by the respondent before it terminated the appellant's services.

The substantive motion for *certiorari* came on for hearing before Vincent Ng J. He agreed with all three grounds advanced by the respondent, issued *certiorari* and quashed the award. It is against this order that the present appeal has been directed.

At the conclusion of arguments before us, we allowed the appeal, set aside the order of the learned Judge and restored the award. We informed Counsel that we would give reasons for our decision.

For convenience, we will deal with each of the three grounds which found favour with the Judge *in seriatim*.

Were the Representations Out of Time?

In order to appreciate the point taken, it is necessary to hearken to the relevant provisions of the Act and apply them to the factual chronology. First, the statutory provisions. They are ss. 20(1) and (1A). And they read as follows:

> 20(1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director-General to be reinstated in his former employment; the representations may be filed at the office of the Director-General nearest to the place of employment from which the workman was dismissed.
>
> (1A) The Director-General shall not entertain any representations under subsection (1) unless such representations are filed within sixty days of the dismissal:
>
> Provided that where a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than sixty days from the expiry thereof.

Upon these provisions we make the following observations.

Firstly, subsection (1) protects a workman from dismissal save for just cause or excuse. Parliament has accordingly placed the right of a workman to continue in employment on the same footing as a proprietary right which may not be forfeited save for just cause or excuse. Employment, that is to say, the right to one's livelihood, is also a fundamental liberty guaranteed by the Federal Constitution. These propositions which were established by the decision of this Court in *Hong Leong Equipment Sdn. Bhd. & Anor. v. Liew Fook Chuan* [1996] 1 MLJ 481 have been accepted as correct by Edgar Joseph

Jr. FCJ in a very recent decision of the Federal Court. See, *Rama Chandran v. The Industrial Court of Malaysia & Anor.*, Federal Court Civil Appeal 02-13-94, as yet unreported.

Next, we note that subsection (1) uses subjective language. The actual words are "where a workman ... considers **that he has been dismissed** without just cause or excuse". In *Goon Kwee Phoy v. J & P Coats (M) Bhd.* [1981] 2 MLJ 129, 136, Raja Azlan Shah CJ (M) (as he then was), when delivering the judgment of the Court, observed that s. 20(1) of the Act has been

> deliberately, couched in subjective terms. Where a non-union workman considers that his dismissal is without just cause or excuse, he may make representations for his reinstatement. **It is not whether he had been dismissed without just cause or excuse; but it is how he considers he has been treated by his employer that constitutes the test for his action.** (Emphasis added.)

Accordingly, in our judgment, for s. 20 to apply, the workman must consider himself to have been dismissed without just cause or excuse. There is no right in a workman to make representations unless and until this condition precedent is satisfied.

When, therefore, does the time limited by subsection (1A) begin to run? The answer to that question must surely be: from the moment the workman considers himself to have been dismissed without just cause or excuse. Not a moment sooner. An objective assessment of the facts of a particular case will disclose the point of time at which the workman had, by words or by conduct, considered himself as dismissed. One may then be able to say when the 60-day period fixed by subsection (1A) began.

So, it all depends on the facts of each case.

Take the case of demotions. A workman in a particular case who suffers a demotion may consider himself to have been dismissed without just cause or excuse. He may treat the demotion as a dismissal. Once he does that, then, he has 60 days from that date to make his representations.

On the other hand, a workman in another case may not treat his demotion as amounting to a dismissal. He may prevail upon his employer to reinstate him to his former position. The employer may not. He may decline the *locus poenitentiae* offered him. The workman may then, at that stage, proceed to consider himself as dismissed. Or it may happen that the employer, instead of reinstating the workman decide to terminate his services for disobedience to the demotion order. The workman may then treat the termination as a dismissal. Many more examples may be given. But they will not help. That is why we said, when we began the current discussion, that each case depends on its own facts.

Ordinarily, we would, at this point, have gone on to examine the facts of the appellant's case. But we must defer that for a moment to deal with another point which is the source of the confusion that has occurred in the present case. It has to do with the expression "constructive dismissal". It is a mere label. It tied up the Judge in knots. We will later show how this happened. For the present, we must try and make the position clear.

As we have said, in order for s. 20(1) to bite, a workman must consider himself to have been dismissed without just cause or excuse. As demonstrated, he may treat some conduct on the part of his employer towards him - conduct that falls short of actual dismissal or termination - as amounting to a dismissal. It may, as in the illustration earlier given, be an order of demotion. Or it may be an order of transfer. The workman in question may consider his demotion or transfer as being the same as a dismissal. In the words of the Act, he "considers that he has been dismissed". But there has been no formal dismissal or termination. Yet the workman may have recourse to s. 20. If it were not so, an employer can make a workman's life so intolerable so as to force him to resign and then boldly say that there was no dismissal. Even the common law recognises that a dismissal may be disguised as a resignation. See, *Stanley Ng Peng Hon v. AAF Pte Ltd.* [1979] 1 MLJ 57.

Where there is no formal order of dismissal, but there is conduct on the part of an employer which makes a workman consider that he has been dismissed without just cause or excuse, lawyers term such conduct as "constructive dismissal". There is no magic in the expression. It is only a convenient label to describe the kind of conduct we have referred to. It could be an order of transfer or of demotion. Or it could be that the workman has been made redundant by the employer. Or it may be a case where the workman is asked to retire. The categories are not, we emphasise, closed.

Where the workman challenges his employer's conduct, it is on the basis that the case is not one e.g., of true redundancy but a dismissal disguised as a redundancy or retirement. Or the challenge may be on the ground that an order of demotion was made in order to force the workman out of his job. It is only when such a challenge is mounted that the question becomes germane. Whether the conduct complained of was in truth a dismissal cloaked as something else is a question of fact. But the facts must disclose that the particular workman considered that he was dismissed by the particular act e.g., of demotion.

It is appropriate at this stage for us to make mention of the decision of the Supreme Court in *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 MLJ 92. The Judge referred to it in his judgment. But in the context of the second ground relied on by him to quash the award.

In *Wong Chee Hong*, the Supreme Court suggested a different test. It is the test applied at common law. What was said there was, of course, pure *obiter dicta*. In any event, they were not referred to the decision in *Goon Kwee Phoy (supra)*. Nor the decision of the Federal Court in *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304. Had that been done, we are confident that they would not have said what they did. When delivering the judgment of the Supreme Court, this is what Salleh Abas LP said:

> The common law has always recognised the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer. It was an attempt to enlarge the right of the employee of unilateral termination of his contract beyond the perimeter of the common law by an unreasonable conduct of his employer that the expression 'constructive dismissal' was used. It must be observed that para. (c) [of the United Kingdom statute] never used the words 'constructive dismissal'. This paragraph simply says that an employee is entitled to terminate the contract in circumstances entitling him to do so by reason of his employer's conduct. But many thought and a few decisions were made that an employee in addition to his common law right could terminate the contract if his employer acted unreasonably. Lord Denning MR, with whom the other two Lord Justices in the case of *Western Excavating (supra)* agreed, reiterated an earlier decision of the Court of Appeal presided by him (see *Marriott v. Oxford and District Co-operative Society Ltd.* [1969] 3 All ER 1126) and rejected this test of unreasonableness. In no uncertain terms, the learned Master of the Rolls declared that the test of dismissal in respect of para. (c) is a contract test. In his view, the Act draws a distinction between 'dismissal', which is in one section, and 'unfairness', which is in another section, and moreover the paragraph is using legal connotations, such as the words 'notice' and 'entitled'.
>
> Thus it is clear that even in England, 'constructive dismissal' does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed if it were so, it is dangerous and can lead to abuse and unsettled industrial relations. Such a proposition was rejected by the Court of Appeal. What is left of the expression is now no more than the employee's right under the common law, which we have stated earlier, and goes no further. Alternative expressions with the same meaning, such as 'implied dismissal' or even 'circumstantial dismissal', may well be coined and used. But all these could not go beyond the common law test.
>
> Turning back to our case under appeal, it is not enough for the learned Judge in the Court below to say that constructive dismissal has no application to the interpretation of s. 20 of the Industrial Relations Act. He must go further and say which of the two alternative views on constructive dismissal has no application and if so, why? Whilst we think that 'constructive dismissal' with the unreasonableness test does not apply, it will be wrong for anyone to hold that 'constructive dismissal' with the contract test does not apply. Perhaps in the context of our law, it is better that we do not use the terminology at all.

When the Industrial Court is dealing with a reference under s. 20, the first thing that the Court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse. Dismissal without just cause or excuse may well be similar in concept to the UK legislation on unfair dismissal, but these two are not exactly identical. Section 20 of our Industrial Relations Act is entirely different from para. (c) of s. 55(2) of the UK Protection of Employment Act 1978. Therefore we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in UK should be introduced as an aid to the interpretation of the word 'dismissal, in our s. 20. We think that the word 'dismissal' in this section should be interpreted with reference to the common law principle. Thus it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situations, the employee is entitled to regard the contract as terminated and himself as being dismissed. (See *Bouzourou v. The Ottoman Bank* [1930] AC 271 and *Donovan v. Invicta Airways Ltd.* [1970] 1 Lloyds Rep. 486).

In *Bouzourou's* case an employee would have been entitled, according to the Privy Council, to regard himself as being dismissed if his transfer from one province to another province rendered him exposed to an immediately threatening danger of violence or disease to his person. And in *Donovan's* case, the Court of Appeal held that when the conduct of the employer was such that it rendered the continuance of the employee's service impossible, the latter was entitled to treat the contract as at end and to obtain damages for wrongful dismissal.

As may be seen, the Supreme Court warned against the use of the phrase 'constructive dismissal'. However, as will become apparent, the learned Judge did not heed the warning. We will have to return to what was said in *Wong Chee Hong* later, when we come to deal with the second ground; especially when dealing with the doctrine of repudiation in the context of industrial law. For the moment, we must turn to the facts and chronology of the present case. These may be conveniently summarised as follows:

(1) 14 January 1989	–	The respondent suspends the appellant.
(2) 28 January 1989	–	The respondent notifies the appellant that a domestic inquiry will be held on 20 February 1989.
(3) 20 February 1989	–	The domestic inquiry is held.
(4) 2 May 1989	–	The respondent writes to the appellant stating that the domestic inquiry had found the charges to be proven. The same letter informs the appellant that he has been reduced in rank and asks him to report for duty on 3 May 1989. However, the appellant does not report for work.

(5)	12 May 1989	–	The respondent writes, requesting the appellant to report for duty in his reduced rank.
(6)	17 May 1989	–	The appellant replies, giving reasons for his refusal to report for work in the demoted rank.
(7)	22 May 1989	–	The appellant writes once again.
(8)	24 May 1989	–	The respondent writes to the appellant giving him seven days to state in writing whether he is prepared to abide by the domestic inquiry's decision. The letter goes on to say that in the absence of a response, the respondent will assume that the appellant is no longer interested in his employment with the company.
(9)	6 June 1989	–	Consequent upon the appellant's refusal to report for work in his demoted position, the respondent writes to the appellant terminating his services on the ground that he is no longer interested in his employment.
(10)	20 July 1989	–	The appellant makes representations to the Director-General.
(11)	2 November 1980	–	The Minister refers the appellant's representations to the Industrial Court. His letter refers to the appellant's dismissal on 6 June 1989.

Based upon this chronology and the relevant conduct of the parties, it is quite obvious that the appellant did not treat the demotion in rank as amounting to a dismissal. He was arguing with his employer, the respondent that he ought to suffer no demotion. The respondent treated the appellant's refusal to accept the findings of the domestic inquiry and his failure to report to work in the reduced rank as amounting to a breach by the appellant of his obligations as an employee. It therefore terminated his employment. The question then is not whether there was any 'constructive dismissal' but whether the termination was justified.

The Minister was very careful when he referred the matter to the Industrial Court. He correctly identified the issue as being the alleged dismissal on 6 June 1989. That is because, until the termination of his employment on that date, the appellant had not considered himself as having been dismissed without just cause or excuse.

When it came to make the award, the Industrial Court addressed itself to the right issue. The question before the Industrial Court was not whether the appellant's reduction in rank amounted to constructive dismissal. The question was whether the termination of the appellant on 6 June 1989 was with or without justification. In dealing with that question the Industrial Court looked at the whole chain of events as forming part of one continuous story. That was the correct approach to take on the facts of this case. It asked itself all the right questions. It did not make any "*Anisminic* error", in the sense in which that expression was used by this Court in *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers' Union* [1995] 2 MLJ 317, 342. The issue it dealt with was well within its jurisdiction. See, *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304, 306 & 312; *L. Michael v. Johnson Pumps Ltd.* AIR [1975] SC 661.

On the facts of this case, it is beyond question that the 60-day time frame did not commence from the date of the demotion - which was never challenged - but from the date of the impugned termination. It follows that the representations were made within the prescribed time limit. The Industrial Court was accordingly not without jurisdiction to entertain the reference.

But the Judge thought otherwise. And his reasons for doing so were expressed in the following passages in his judgment:

> It was the Applicant Company's contention that the Industrial Court had considered the question of constructive dismissal of the respondent when it was not seized *(sic)* with this issue in its terms of reference. In order for the Court to consider what was considered and thus, what was the focal point of the Industrial Court's decision, it would be relevant to reproduce the part of the Chairman's speech in the said award which reads:
>
> > Is the above evidence sufficient to justify the dismissal of the claimant? Certainly no. The company has not called, e.g. Dato' Mak Kok, the Managing Director of the company to justify the downgrading of the claimant which the claimant had claimed that there was absolutely no justification on the company's part to demote him. Claimant had claimed there was no proof at all of any guilt on his part. The claimant had also challenged the company on the very composition of the panel of inquiry who had found him guilty of charges levelled against him which resulted in his downgrading. In the circumstances it is very relevant on the part of the company to call the chairman of the panel of inquiry and produce the notes taken at the inquiry and the findings of the panel, to convince this Court that claimant was properly downgraded and therefore he has no justification in refusing to comply.
> >
> > Moreover, on the evidence we have before us and on the balance of probabilities, I find that there was victimisation in this case and it appears that the company was all out to get rid of the claimant.
> >
> > As such, I find that the dismissal was without just cause or excuse.

From the above excerpt, I have no doubt that the Industrial Court had considered the issue of constructive dismissal which the Chairman termed as 'downgrading'. He even went so far as to say that the respondent was victimised in the downgrading exercise.

The respondent had in his complaint letter dated 20 July 1989 requested for 'my reinstatement as General Manager of Pan Global Textile Bhd.' His Counsel, Mr. Shanmugam had also stated that the real issue was reinstatement and the worker had been consistently asking for reinstatement to his former position as General Manager. Indeed, before the hearing commenced in the Industrial Court, the respondent had submitted an amended statement of case to bring in the plea of constructive dismissal. Though the Industrial Court had held that 'the claimant's claim of constructive dismissal was totally erroneous and therefore the question of jurisdiction did not arise', yet in the same Award it was found that the respondent 'was merely complaining about his demotion and wanted his job back'. This, when considered in conjunction with contents of the respondent's aforesaid complaint letter to the Director-General seeking his reinstatement as General Manager of Pan Global Textile Bhd., would show that his real complaint was against his constructive dismissal.

The trade dispute that was referred to it was dismissal and not constructive dismissal. This is clear from the Award itself which states as follows:

> Thus it is clear that what has been referred to this Court by the Minister for an award is in respect of the alleged dismissal which occurred on 6 June 1989 as a result of R5 quoted above and not any other dismissal.

An employee's relief against constructive dismissal and dismissal are entirely distinct and separate reliefs, both being available to the employee under the Act. As such, it is not open to the Industrial Court to deliberate on the question of constructive dismissal when the issue referred to it was dismissal *vide* letter dated 2 November 1990.

Furthermore, though the Industrial Court had made a finding that there was no constructive dismissal, yet the record show that it had considered and made a finding that 'the company had not called e.g. Dato' Mak Kok, the Managing Director of the company to justify the downgrading of the claimant ... to call the chairman of the panel of the inquiry and produce notes taken at the inquiry and the finding of the panel to convince this Court that the claimant was properly downgraded ...'

It cannot be disputed that as soon as the respondent was notified of his demoted position, the relief of constructive dismissal was available to him under the Act, and he did not avail himself by seeking that relief within the 60-day period in which to make the representation under s. 20(1A) of the Act. See the cases of *Hotel Perdana Sdn. Bhd. (Kota Bharu) v. Puan Ruth Fam Nee Chan Siew Peng* (Kota Bharu) [1992] 1 ILR 172 and *National Union of Hotel, Bar & Restaurant Workers v. Rasa Sayang Beach Hotels (Pg) Bhd. & Anor.* [1988] 2 MLJ 367. In this regard, it was also submitted by Mr. Shanmugam that the calculation of the 60-day period should run from the letter dated 24 May 1989 and not from the letter dated 12 May 1989 which, if so, would bring the

> respondent's representation to the Director-General to within the 60-day period. I disagree, as it stands to reason that a *representation, being in essence a serious industrial complaint, ought rightly to be made as soon as an employee first had official notice of the employer's act which is the essence of his complaint and which he seeks to impugn.* In the current case, this would be when the respondent received the letter dated 2 May 1989 from the applicant company requesting him to report for duty on the demoted position of Manager, (General Affairs) on 3 May 1989; and at the very latest it should be when the reminder dated 12 May 1989 was written to him. On the facts and the admitted chronology of events, I hold that the respondent was clearly out of time under s. 20(1A) of the Act to make his claim for constructive dismissal and it was not before the Industrial Court to make any finding on the matter and neither was it referred to it by the Minister. (Emphasis added).

In the first place, it is plain that the learned Judge treated the time postulate under the Act as being inextricably intertwined with the demotion which the appellant suffered at the hands of the respondent. And it is for that reason that he held the 60-day period to have commenced from the date when the appellant was notified of his demotion. In this he was clearly wrong. For, he treated the two matters that lay at the heart of the case – the demotion and the subsequent termination – as constituting two separate and unconnected events. In this he was clearly wrong because these two events form part of a continuous story. As we have earlier observed, that is how the Industrial Court approached the factual matrix. The learned Judge ought to have approached the case in the same way. Instead he was distracted by the label "constructive dismissal". That is where he went wrong.

Secondly, the learned Judge appears to have proceeded on the basis that the appellant was obliged to treat his demotion as amounting to a dismissal. The passages from his judgment which we have quoted *in extenso* reflect this line of reasoning. But that is not the position even according to the ordinary principles that govern the relationship between employer and employee at common law. See, *Thomas Marshall (Exports) Ltd. v. Guinle* [1979] 1 Ch. 227.

In *Gunton v. Richmond-Upon-Thames London Borough Council* [1980] 3 WLR 714, Buckley LJ (who formed the majority) affirmed the view that contracts of service did not fall outside the general rule governing the discharge of contracts by repudiation. He said (at pp. 728 - 730):

> In *Howard v. Pickford Tool Co. Ltd.* [1951] 1 KB 417, 421 Asquith LJ employed a colourful phrase: 'An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind.' It is common ground that in respect of the generality of contracts that is good law. As Viscount Simon LC said in *Heyman v. Darwins Ltd.* [1942] AC 356, 361:
>
> > But repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other.

The principle was recognised 100 years ago in such cases as *Hochster v. De La Tour* [1853] 2 E. & B. 678 and *Johnstone v. Milling* [1886] 16 QBD 460. The basis of the doctrine is that where a party to a contract before the date for performance has arrived evinces an intention not to perform his part of the contract, he has committed no breach until the date for performance arrives. Nevertheless the innocent party will be relieved of his obligations under the contract, if he so chooses, so as to render him free to arrange his affairs unhampered by the continued existence of those obligations. It is for the innocent party to elect whether he wishes to be so relieved, which he does by accepting the repudiatory act of the guilty party as a repudiation of his, the guilty party's, obligations under the contract. In those circumstances the innocent party may treat the guilty party as having committed an entire breach of the contract notwithstanding that the time for performance has not yet arrived. Where the time for performance of part of the guilty party's obligations has arrived but some of those obligations remain executory, the position is the same as regards those obligations which remain executory as it is in respect of all the guilty party's obligations where none of them has yet become due for performance. If the guilty party has evinced an intention not to perform those obligations of his which remain executory, the innocent party may elect to treat himself as discharged from all obligations on his part to perform the contract any further. He does so by accepting the guilty party's repudiation of his outstanding obligations under the contract, in which case the innocent party may treat the guilty party as having committed an entire breach of all his outstanding obligations under the contract notwithstanding that the time for performance of those obligations, or some of them, may not yet have arrived.

Why should the doctrine operate differently in the case of contracts of personal service from the way in which it operates in respect of other contracts? I for my part can discover no reason why it should do so in principle. It cannot be because the Court will not decree specific performance of a contract of personal service, for there are innumerable kinds of contract which the Court would not order to be specifically enforced, to winch the doctrine would undoubtedly apply. For similar reasons it cannot, in my opinion, be because a contract of personal service involves a relationship of mutual confidence, or because the obligations of a master and a servant are mutually dependent upon co-operation between the parties. If one party to a contract of personal service were to repudiate it before the time for performance had arrived, there would be no breach of contract until the time for performance and no cause of action until then, unless the innocent party chose to create one by accepting the repudiation. **I can only conclude that the doctrine does apply to contracts of personal service as it applies to the generality of contracts.**

However, cases of wrongful dismissal in breach of a contract of personal service have certain special features. In the first place, as the term 'wrongful dismissal' implies, they always occur after the employment has begun and so involve an immediate breach by the master of his obligation to continue to employ the servant. Secondly, a wrongful dismissal is almost invariably repudiatory in character; it is very rarely that there can be any expectation that the master will relent and take the servant back into his service under the contract. Thirdly, the servant cannot sue in debt under the contract for remuneration in respect of

any period after the wrongful dismissal, because the right to receive remuneration and the obligation to render services are mutually interdependent. Fourthly, the servant must come under an immediate duty to mitigate his damages and so must almost invariably be bound to seek other employment in fulfilment of that obligation; it would be very rarely that he could expect to find other employment, or could mitigate his damages in any other way, which would leave him free to return to his original employer's service at any moment, should the original employer relent. It follows, in my view, that at least as soon as the servant finds, and enters into, other employment he must put it out of his power to perform any continuing obligations on his part to serve his original employer. At this stage, if not earlier, the servant must, I think, be taken to have accepted his wrongful dismissal as a repudiatory breach leading to a determination of the contract of service.

Finally, in a case of wrongful dismissal in the absence of special circumstances the damages recoverable on the footing of an accepted repudiation must, I think, be as great as, and most probably greater than, any damages which could be recovered on the footing of an affirmation of the contract by the innocent party and of the contract consequently remaining in operation.

So, as was recognised in the *Decro-Wall* case [1971] 1 WLR 361 and in *Ivory v. Palmer* [1975] ICR 340, a wrongfully dismissed servant really has, in the absence of special circumstances, no option but to accept the master's repudiation of the contract.

It consequently seems to me that, in the absence of special circumstances, in a case of wrongful dismissal the Court should easily infer that the innocent party has accepted the guilty party's repudiation of the contract. **I do not think, however, that it is impossible that in some cases incidental or collateral terms might cause the injured party to want to keep the contract on foot.**
(Emphasis added).

Returning to the present case, if, at the point in time when he was notified of the respondent's decision to demote him, the appellant had, by words or conduct, demonstrated that he considered himself to have been dismissed by the act of demotion, then time would have commenced to run from that date. If, however, as transpired in the present case, the appellant did not consider himself dismissed, but allowed the respondent to reconsider its decision, then it cannot be said that he considered himself to have been dismissed without just cause or excuse. It was a question of fact to be determined by the Industrial Court. And that is what the Industrial Court did when it said that this was not a case of constructive dismissal.

There is just one other point under the first issue. It is this. When dealing with this aspect of the case, the Judge seems to have thought that constructive dismissal is a kind of relief. He has said so in his judgment. We have underscored the relevant passages. Of course, constructive dismissal is not a relief. Reinstatement is a type of relief. So is compensation. Either may be awarded where the Industrial Court holds that there is a dismissal without just

cause or excuse. The Judge was therefore clearly wrong when he treated constructive dismissal as a form of relief.

For the reasons given, we were satisfied that the learned Judge was wrong in holding that the appellant's representations were out of time. They were not.

With that, we now turn to consider the second ground.

Was the Appellant Dismissed?

The learned Judge in quashing the award of the Industrial Court held that it had exceeded its jurisdiction in holding that the appellant had been dismissed. According to the Judge, there was no dismissal because it was the appellant who had repudiated his contract of employment by staying away from work without justification. And since there was no dismissal by the employer, the Industrial Court had exceeded its jurisdiction in making its award. In arriving at this conclusion, the learned Judge applied the following passage in the judgment of Lord Denning in *London Transport Executive v. Clarke* [1981] ICR 355, 365:

> I would ask this question: can an employee take off – go absent without leave – for six months and on returning say to his employer: 'You have not dismissed me. I want my job back.' If the employer refuses to take him back, can the man say: 'By your refusal you have dismissed me. Now I claim for unfair dismissal.' Surely in such a case, by taking off for six months without leave, the man has dismissed himself. If this be correct when he takes off for six months, it should also be for two months, or as here for seven weeks. The reason is because it is completely inconsistent with the continuance of his contract that he should take so long a time off. In some cases the employer will have replaced him by some other man or have got his work done by others. In other cases he may have left his work undone. But whichever it is, the employer cannot reasonably be expected to take him back. The man will himself have terminated his contract of employment.

There are three comments we would make upon the view expressed by Lord Denning in the foregoing passage.

First, the United Kingdom legislation under which *Clarke (supra)* was decided differs from the Act in material respects. The Supreme Court in *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. (supra)* recognised this and said so. We must therefore be very careful when we refer to English cases in this area of the law. We must on no account be swayed by them when interpreting s. 20(1) of the Act.

Second, while the ordinary principles of common law relating to the discharge of a contract of service by repudiation and acceptance may continue to apply under the United Kingdom statute, they are wholly irrelevant to a case under s. 20(1) of the Act. Industrial adjudication is not concerned with the

technicalities that form part and parcel of the common law doctrine of repudiation. Indeed, s. 30(5) of the Act expressly declares that the Industrial Court

> shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

Accordingly, in our judgment, the Industrial Court, when it comes to decide whether a workman was dismissed without just cause or excuse is wholly unconcerned with whether there was a repudiation by the workman of his contract of employment which was accepted by the employer, but rather with the much broader question whether what happened to the workman was just and equitable. If, at the end of the day it finds that the conduct of the workman in all the circumstances of the case was such that he deserved what he got, then, *cadit quaestio*. But, if it finds the act or omission on the part of the employer that deprived the workman of his proprietary right to earn a living to have been without just cause or excuse, then, it will, and must interfere. It must set matters right by making an award in favour of the workman. It may reinstate him. Or, if reinstatement is not the appropriate relief, it will usually award him reasonable compensation according to the circumstances of the particular case.

This brings us again to the decision in *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 MLJ 92, in particular, to the passage in the judgment of Salleh Abas LP which we have reproduced earlier. The learned Lord President there said that the word "dismissal" in s. 20 of the Act must be interpreted according to its meaning in common law. He referred to *Bouzourou v. The Ottoman Bank* [1930] AC 271, which was a case of wrongful dismissal at common law. But we are not here dealing with a case at common law. And it is noteworthy that in a later decision, the Privy Council has recognised the wider scope of industrial adjudication to cover cases where an employer has done no more than exercise his legal rights. See, *United Engineering Workers Union v. Devanayagam* [1967] 2 All ER 367 per Viscount Dilhorne at p. 371.

The position under the Act was explained by the Federal Court in *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304, 312. Chang Min Tat FJ, when delivering the judgment of the Court said:

> It follows, in our view, that the letter and spirit of the Act which Mr. J. Puthucheary concedes as extending to protect workmen who are members of a trade union from dismissal without just cause or excuse extend the same protection to a workman who is not a member of a trade union, so that despite the contractual provision of termination by notice, such a workman who considers he has been dismissed without just cause or excuse may make representations for reinstatement. It further follows that on a proper interpretation of the relevant sections of the Act, **there is no material distinction between dismissal and termination. Either must be with just cause or excuse to be**

justifiable; otherwise the Industrial Court may make an award. The only difference is the regard of the employer for the susceptibilities of the workman to the action being taken against him.

If this raises the hackles of employers and calls for denunciations about shackles on the freedom of contract, the following extract from the judgment of Gajendragadkar J in *R.B. Diwan Badri Das & Ors. v. Industrial Tribunal, Punjab, Patiala & Ors.* AIR [1963] SC 630 at pp. 633-4 will provide the answer:

> The broad and general question raised ... on the basis of the employer's freedom of contract has been frequently raised in industrial adjudications; and it has consistently been held that the said right is now subject to certain principles which have been evolved by industrial adjudication in advancing the cause of social justice ... .
>
> **The doctrine of the absolute freedom of contract has thus to yield to the higher claims for social justice ...** . Industrial adjudication does not recognise the employer's right to employ labour on terms below the terms of minimum basic wage. This, no doubt, is an interference with the employer's right to hire labour; but social justice requires that the right should be controlled. **Similarly the right to dismiss an employee is also controlled subject to well-recognised limits in order to guarantee security of tenure to (industrial) employees ... .**

The judgment of Gajendragadkar J also cited with approval a passage from the judgment of Mukherjea J in *Bharat Bank Ltd., Delhi v. Employees of the Bharat Bank Ltd., Delhi* AIR [1950] SC 188 at p. 209 which perhaps deserves to be quoted:

> In settling disputes between the employers and the workmen, the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or to give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace.

Now the right to contract is, in the case of a trade union, restricted by law and, by the provisions of s. 13(3), no trade union of workmen may include in its proposals for a collective agreement a proposal, *inter alia*, regarding the termination by an employer of the services of a workman by reason of redundancy or by reason of the reorganisation of an employer's profession, business, trade or work or the criteria for such termination or for the dismissal and reinstatement of a workman. Clearly, therefore, the right to employment secured by the legislation for the workman must be balanced against the just requirements of the employer.

By the same token, the provision of 'dismissal without just cause or excuse' in s. 20(1) as a ground for a reference under s. 20(3) implies in the case of a non-union workman that the right to 'fire' implied in a 'hire', in the social legislation of the Act, is limited to termination with just cause or excuse. Any other

> interpretation would fail to recognise that in entering into a contract of employment the employer holds the sword by the hilt and requires the employee to grasp it by the blade and would make nonsense of the whole purpose and intent of s. 20. Were it otherwise, all that the employer has to do would be to be prudent and provide in express terms for termination of the employment at will, and he would then escape the operation of the Act. But that would stultify the Act and offend well-known principles of interpretation of statutes.
>
> Mr. J. Puthucheary has been able to find from his researches at least three cases: *D.N. Banerji v. P.R. Mukherjee & Ors.,* AIR [1953] SC 58, *A.R. Varma & Anor. v. Mettur Industries Ltd.* AIR [1961] Mad 393 and *L. Michael & Anor. v. Johnson Pumps Ltd.,* AIR [1975] SC 661 in which it was held that the jurisdiction of the Tribunal was in no way limited or circumscribed by considerations based on the contractual provisions of termination and the Tribunal can always scrutinise an innocent-looking order of 'termination simpliciter' and if it finds it was not *bona fide* or reasonable, it has the jurisdiction to set it aside.

This Court has, in *Hong Leong Equipment Sdn. Bhd. & Anor v. Liew Fook Chuan (supra),* held that the very purpose for which Parliament passed the Act and the several amendments thereto was to mitigate the rigours of the common law and the doctrines of equity in their application to the relationship between an employer and his workman. It is therefore too late in the day to try and interpret the Act to keep it in line with the common law doctrines that apply to a breach of contract. It follows that the remarks of Lord Denning in *Clarke* have no application to a case under the Act.

Thirdly, it is noteworthy that although Lord Denning concurred in the final result, his views formed the minority view. The other two members of the English Court of Appeal (Templeman and Dunn LJJ) differed from the Master of the Rolls when it came to the reasons for allowing the appeal. The learned Judge in the present case unfortunately failed to notice this important matter. In any event, later English cases have refused to apply the theory of "self-dismissal" propounded by Lord Denning in *Clarke*. See, *Pendlebury v. Christian Schools North West Ltd.* [1985] ICR 174.

With that we now turn to see how the learned Judge dealt with the second ground. This is what he said:

> In the matter before me, after the respondent was found guilty of several charges against him, and the Board of Inquiry's recommendation that he be demoted to the position of Manager (General Affairs) was implemented *vide* the letter dated 2 May 1989 to him, the respondent had the option at that point in time of his receipt of the letter dated 2 May 1989, to refer the matter to the Director-General, since he was unhappy about the composition of the panel of inquiry resulting in his demotion. Instead, he stayed away from work. The act of being absent is itself a misconduct on the part of the respondent. The post-demotion conduct of the applicant as aforesaid makes it unrealistic and unjust for the Court to conclude that the Applicant Company had repudiated the contract of employment or alternatively had terminated the contract of employment. Indeed it is the act

of the respondent by staying away from work, which evinces an intention of not wanting to continue his employment with the applicant thereby repudiating the contract of employment. This being so, the letter of the applicant dated 6 June 1989 ought to be taken as an acceptance of the repudiation and/or a termination of the contract of employment, when considered in the light of the *London Transport Executive* case. It can be similarly held in this case, having regard to equity and the events of the case, that the applicant company had acted reasonably in treating the repudiatory conduct of the respondent as sufficient reason for accepting the repudiation and thus determining the contract. The respondent absenting himself from work without consent for what he considered was a good reason, is no basis to hold that the respondent did not repudiate his contract of employment. It is crystal clear that the respondent here took no action concerning his unhappiness with the applicant company's earlier decision on his demotion, until forty-four (44) days after the applicant company had accepted his repudiatory conduct and the contract of employment was terminated. The aforesaid conduct of the respondent implies that his subsequent action was an afterthought. Perhaps, it was because the time limit stipulated in s. 20(1A) had already expired at the material time, that the respondent did not make a formal complaint on the constructive dismissal and/or demotion to the Director-General pursuant to s. 20(1) Industrial Relations Act 1967.

Is it in the interests of sound commercial climate or good industrial relations to condone the action of an employee who stays away from work when he is demoted and claim to remain an employee until the company agrees to his request for reinstatement to his former position and benefits? Can we take away an employer's right, if justifiably exercised, to demote an employee? Taking an extreme example, if the employee chooses to stay away from work, without lodging any statutory complaint, for two (2) years after demotion while requesting for reinstatement, what could the employer do to avoid the complaint of having dismissed or constructively dismissed the employee? It cannot be correct either in law or in equity to oblige the employer either to wait indefinitely for the employee's return or to cave-in to his demands. Therefore, the question posed here as to whether the respondent was dismissed – as posed in *Wong Chee Keong, (supra)* – should be answered in the negative. Thus, I held that the applicant company did not dismiss the respondent, who by his failure to report to work had dismissed himself, and the question of whether 'dismissal was without just cause or excuse by his employer did not arise.'

Now, it is clear from the foregoing passages that the learned Judge decided to quash the award by relying on the common law principles governing the repudiation of a contract and his acceptance of the so-called doctrine of self-dismissal stated by Lord Denning in *Clarke*. We do not propose to repeat what we have said when discussing the judgment of Lord Denning in *Clarke.* Suffice to say that, for the reasons we have given earlier, the Judge was clearly wrong in his quashing the award based on the reasoning advanced by him.

The extreme example provided by the learned Judge to illustrate the merit in his reasoning clearly overlooks a point of singular importance. It is not the law that every representation made by a workman must be referred by the

Minister to the Industrial Court. The Act vests a discretion in the Minister whether to refer or not to refer. It is settled law that representations that are frivolous or vexatious should not be referred at all. We call this "the Hashim Yeop test". See, *Hong Leong Equipment Sdn. Bhd. & Anor v. Liew Fook Chuan (supra).*

The illustration provided by the learned Judge furnishes its own answer. No reasonable Minister will ever refer a representation which is made based on the facts contemplated by the Judge. If he does, then we will intervene and quash the reference on well-established principles. So, there is really nothing in the extreme case contemplated by the Judge.

That brings us to the third and last ground.

Was the Dismissal Without Just Cause or Excuse?

To recall, the Judge proceeded on the footing that the Industrial Court had held the dismissal to have been without just cause or excuse because no inquiry had been conducted by the respondent before it terminated the appellant's services. This is what he actually said:

> The third and last issue is: if there was in fact and in law, termination of the respondents' services *vide* the letter dated 6 June 1989, then was the summary termination of the respondents' services in the circumstances of the case, tantamount to a dismissal without just cause and excuse? In the case of *Dreamland Corporation (M) Sdn. Bhd. v. Choong Chin Sooi & Anor.* [1988] 1 MLJ 111, it was held that the workman who was dismissed for misconduct was lawfully dismissed although no inquiry had been held. The acid test to apply is as expressed in *Dreamland Corporation (supra)* thus:
>
> > Where an employer has not followed a proper procedure, the right approach is for the Industrial Tribunal to ask two questions. First, have the employers shown on the balance of probabilities that they would have taken the same course had they held an inquiry and had they received the same information which that inquiry would have produced? Secondly, have the employers shown that in the light of the information which they have had, had they gone through the proper procedure, they would have been behaving reasonably in still deciding to dismiss.
>
> Upon the facts, the answers to the two questions above, in this matter would also be in the affirmative. The fact that the applicant company did not conduct an inquiry on the conduct of the respondent in not reporting for work is not fatal; there would be no additional information which would be gathered from the inquiry and the decision would have been the same, as the misconduct of the respondent is clear and not unambiguous. Furthermore, had an enquiry been held the respondent would have raised the issue of demotion, and this would not be the proper forum for the respondent to do so, considering that the proper forum under the law to raise such an issue and to lodge his complaint, would be to the Director-General pursuant to s. 20(1) of the Industrial Relations Act 1967. The respondent had adopted an attitude of indifference. Would not the

a action of the employer in such circumstances be justified? Yes it would, as otherwise all employees will stay away from work to win their demand whether valid or invalid, and yet tie the hands of the employer from taking any action without being accused of having dismissed the employee from his employment.

Upon the above rationale I further held that in the circumstances of this case b there was no necessity for the applicant company to carry out any disciplinary proceedings or enquiry before taking the action they did when the respondent refused to report for duty on the demoted position of General Affairs Manager.

In our judgment, the learned Judge was wrong in three respects. First, the learned Judge seems to have thought that the Industrial Court had run foul of c the decision in the *Dreamland* case. But that was not so. Indeed, the Industrial Court correctly applied that decision. The learned Chairman made that quite clear in the following passages of his award:

Having disposed of the first issue, we are now left with the issue whether the dismissal was with just cause or excuse. d

As stated in CL1 p. 35 and p. 38, the reason for terminating claimant's services was because claimant was no longer interested to be employed in the company as he had failed to abide by the company's decision arising from the domestic inquiry. Clearly, the claimant had not abandoned his services but they were summarily terminated for the misconduct of failing to report for duty to a demoted e position as decided by the company.

The company did not conduct any disciplinary proceedings as regards to the alleged misconduct. The claimant was not asked to explain as to why he had failed to report for duty in compliance with the decision of the company. He was not given the right to be heard. The company has failed to make an inquiry f before terminating the service of the claimant.

However, *Dreamland Corporation (M) Sdn. Bhd. v. Choong Chin Sooi & Anor.* [1988] 1 MLJ 114 (Supreme Court) wherein the Court approved the principle enunciated by the Indian Supreme Court in *Workmen of the Motipur Sugar Factory Pte. Ltd. v. The Motipur Sugar Factory Pte. Ltd.* AIR [1965] 1803. It g states:

Where an employer has failed to make an inquiry before dismissing or discharging a workman, it is open to him to justify his action before the tribunal by leading all relevant evidence before it. The entire matter would be open before the tribunal. It will have jurisdiction not only to go into h the limited question open to a tribunal where domestic inquiry has been properly held, but also to satisfy itself on the facts adduced before it by the employer whether the dismissal or discharge was justified. The important effect of omission to hold an inquiry is merely that the tribunal would not have to consider only whether there was *prima facie* case but i would decide for itself on the evidence adduced whether the charges have really been made out.

> This the company has failed to do. In this Court the company called only one witness, Tan Kai Swee, the Senior General Manager of the Company. I am reproducing the whole of his evidence in examination-in-chief.

The learned Chairman having set out the evidence in question continued as follows:

> Is the above evidence sufficient to justify the dismissal of the claimant? Certainly no. The company has not called, e.g. Dato' Mak Kok, the Managing Director of the company to justify the downgrading of the claimant which the claimant had claimed that there was absolutely no justification on the company's part to demote him. Claimant had claimed there was no proof at all of any guilt on his part. The claimant had also challenged the company even the very composition of the panel of inquiry who had found him guilty of charges levelled against him which resulted in his downgrading. In the circumstances it is very relevant on the part of the company to call the chairman of the panel of inquiry and produce the notes taken at the inquiry and the findings of the panel, to convince this Court that claimant was properly downgraded and therefore he has no justification in refusing to comply.
>
> Moreover, on the evidence I have before me and on the balance of probabilities, I find that there was victimisation in this case and it appears that the company was all out to get rid of the claimant.
>
> As such, I find that the dismissal was without just cause or excuse.

These passages make it clear that the Industrial Court found the appellant's dismissal was bad, not because of the absence of an inquiry into his reasons for failing to report to the demoted position, but, because he had been victimised. The reference to the respondent's failure to call relevant witnesses during the hearing before the Industrial Court was confined to the discharge of the burden that lay upon the respondent to show that the dismissal was for just cause or excuse.

Second, the learned Judge appears to have assumed the task of making a finding that based on the facts of the case the appellant's dismissal was justified. What the learned Judge did smacks of the exercise of appellate power when the jurisdiction he was exercising was purely supervisory. The question whether the appellant's dismissal was justified or amounted to an act of victimisation was one which was for the Industrial Court to determine. What the Judge did, in effect, was to reverse the decision of the Industrial Court and to substitute his own decision therefor. This, needless to say, was wrong.

No doubt that in the exercise of the supervisory jurisdiction on the ground of what has come to be termed in public law as "*Wednesbury* unreasonableness", the High Court is entitled to, and does, examine, not merely the decision-making process, but the merits of a decision itself. But the Court is not, by reason of this, converted into an appellate tribunal for that purpose. See, *Rama Chandran v. The Industrial Court of Malaysia & Anor.* per Edgar Joseph Jr. FCJ.

The role of a High Court when exercising the powers conferred upon it by para. 1 of the Schedule to the Courts of Judicature Act, 1964, in the context of public law remedies was explained by the Federal Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor.* [1995] 3 MLJ 369, 393 as follows:

> The true principle governing the grant of prerogative relief appears in the following passage in the judgment of Bose J in *Sangram Singh v. Election Tribunal* AIR [1955] SC 425 at p. 429:
>
> > That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as Courts of appeal under Art 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily; and *one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into Courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense,* for, though no Legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the Legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case. (Emphasis added).

The third error made by the learned Judge has to do with the point we have already discussed when dealing with the first and second issues. To summarise, this is a case where the Industrial Court had to determine whether the termination of the appellant was a *bona fide* exercise of managerial power or a case of unjustified dismissal cloaked as a termination simplicter. In carrying out that task, the Industrial Court had to deal with the appellant's conduct in failing to assume the post to which he had been demoted and his reasons therefor. It also had to deal with the respondent's contention that the appellant's refusal to take up his demoted post entitled it to terminate the appellant's services. It did all this and at the end of the exercise came to the conclusion that the whole process – the inquiry followed by the demotion and the eventual termination – were designed to victimise the appellant. That is a conclusion that was well within the scope of its inquiry. It did not commit any error of law when performing the task entrusted to it. Indeed, the learned Chairman must be commended for correctly approaching the facts of the case. The strictures passed upon him by the learned Judge were wholly unwarranted. If anything, it was the Judge who exceeded his role. He got the facts and the law wrong. He interfered when he should not have.

Having satisfied ourselves that the learned Judge was wrong for the reasons we have set out in this judgment, we had no alternative but to allow the appeal. The orders made by the Judge were set aside. The award of the Industrial

Court was reinstated. Costs of the appeal and of the proceedings in the Court below were awarded to the appellant and the deposit paid into Court was ordered to be refunded to him.

Reported by Isaac TJ Lee